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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/482,688	01/13/2000	PAUL T. GARDINER	23925-4	7344

7590 03/11/2002

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EXAMINER	
CHOI, FRANK I	

ART UNIT	PAPER NUMBER
1616	

DATE MAILED: 03/11/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action	Application No.	Applicant(s)	
	09/482,688	GARDINER ET AL.	
	Examiner	Art Unit	
	Frank I Choi	1616	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 13 February 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.

b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☒ A Notice of Appeal was filed on 2/13/02. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.

2. ☐ The proposed amendment(s) will not be entered because:

   (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);

   (b) ☐ they raise the issue of new matter (see Note below);

   (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

   (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____.

3. ☒ Applicant's reply has overcome the following rejection(s): See Continuation Sheet.

4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

5. ☒ The a)☐ affidavit, b)☐ exhibit, or c)☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.

6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

7. ☒ For purposes of Appeal, the proposed amendment(s) a)☐ will not be entered or b)☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

   The status of the claim(s) is (or will be) as follows:

   Claim(s) allowed: _____.

   Claim(s) objected to: _____.

   Claim(s) rejected: 1,3-5,7,8,10-16,18-25,27-29,31-34,36-38,40-43,45-47,49-59,62 and 64-67.

   Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a)☐ approved or b)☐ disapproved by the Examiner.

9. ☐ Note the attached Information Disclosure Statement(s)(PTO-1449) Paper No(s). _____.

10. ☐ Other: _____

JOHN PAK
PRIMARY EXAMINER
GROUP 1600

Continuation of 3. Applicant's reply has overcome the following rejection(s): 35 USC 112 rejections over claims 5,20-24,29,38,47,53-57,63. Allthough 13, 64 no longer depend on cancelled claims they still contain trademarks.

Continuation of 5. does NOT place the application in condition for allowance because: Applicant argues that Schneider does not teach a specific formulation, however, Schneider et al. expressly discloses a composition comprising casein, arginine, methionine and folic acid (Column 7, lines 15-68, Column 8, lines 1-45) and as such fall within the scope of Claims 1, 8. As such, with respect to claims 13-17, 58, 59, 64 which claim a specific type of amino acid source and form of the composition, there is no need to speculate as to choosing substances which increase nitric oxide production but simply a substitution of an amino acid source, i.e. whey protein for casein. Examiner notes that Applicant appears to argue that the reference fails to contain all of the members of the markush group of nitric oxide, however, there is no requirement that a 102 reference contain all members of a markush group so long as at least one menber is in the express disclosure, i.e. methionine or folic acid. In Portman, compositions comprising arginine, whey protein and ginseng are expressly disclosed (Column 18, lines 5-38, claims 1-77) and, thus, fall within the scope of claims 1,3,8,13-16, 18, 25, 27, 34, 36, 37, 43, 45, 58. With respect to the 103 rejection of claims 1,3-5,7,8, 10-16, 18-25,27-29,31-34,36-38,40-43,45-47,49-59,62,64-67, Applicant argues that there is no motivation to combine Portman with Doi et al., Kim et al., Droge, Larner et al., Jableck et al., Maxwell et al. Food Chem. News and Kolla et al.. Applicant notes that in light of cancellation of claim 63, Kolla et al. is no longer necessary. In any case, there is ample motivation to combine the ingredients, as multiple component formulations are well known in the art (See Portman and Schneider et al.). As such, it would have been well within the skill of and one of ordinary skill in the art would have been motivated to combine multple components together so as to avoid the inconvenience of having to take multiple supplements and each of the components is desired so as to increase muscle strength and/or exercise performance by enhancing or complementing the effect or amount of insulin and/or nittrous oxide. With respect to the rejection of claims 13,15,16,64 over 35 USC 112 due to the use of trademarks, the rejection is still applicable. Examiner directs Applicant to MPEP Section 2173.05(u) which indicates that the use of a trademark or tradename in a claim to identify or describe a material or product not only renders the claim indefinite but consitutues an improper use of the trademark or tradename.